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# **TITLE TO TERRITORY AND JURISDICTION IN INTERNATIONAL HUMAN RIGHTS LAW: THREE MODELS FOR A FRAUGHT RELATIONSHIP**

## **Abstract**

*It is by now uncontroversial that states may owe human rights obligations to individuals outside their territory. The debate about extraterritoriality has so far focused on the concept and interpretation of jurisdiction. The role of territory in general, and title in particular, in the conceptual landscape has received less attention in comparison. This article aims to fill this gap by showing that (a) title to territory continues to shape interpretations of jurisdiction, and (b) that this should be avoided. To this end, the article first defines jurisdiction and title to territory. Jurisdiction is best understood as a threshold criterion that triggers human rights obligations of states towards particular individuals. Title to territory, on the other hand, is a set of claims to territory designed to uphold minimal stability. The paper then introduces three models – the approximation model, the differentiation model, and the separation model – of the relationship between title to territory and jurisdiction in international human rights law and evaluates them in light of their fit with the relational nature of human rights. The result is that the approximation and differentiation models – that is, those that maintain title's influence on the interpretation of jurisdiction in various degrees – fail the success criterion, while the separation model satisfies it.*

## **1. Introduction**

Does the United Kingdom owe human rights obligations to the population of Iraq because it is an occupying power? When the United States is listening in on the phone calls of a French citizen who lives in Belgium, does international human rights law, and thus the right to privacy,

apply? These are questions that implicate what is known as the extraterritorial application of human rights treaties. By now, it is uncontroversial that every international human rights instrument may impose at least some extraterritorial obligations, and that the concept of jurisdiction is central to this issue.<sup>1</sup> I have no quarrel with either the idea of extraterritorial application of human rights treaties, nor with the idea that jurisdiction is the correct focus of this debate. Consequently, it is not the aim of this article to contest extraterritoriality, or to offer an account of jurisdiction. Instead, the present article focuses on the specific role notions of title play in the debate about extraterritoriality and the interpretation of jurisdiction. I argue that the notion of title to territory continues to shape the interpretation of jurisdiction – whatever the correct one may be – and that this should be avoided from the perspective of international human rights law because of the fundamentally opposed purposes of the two concepts.

Let me first introduce the debates as I read them. Extraterritorial application means an instance where a state owes human rights obligations to an individual situated outside of its territory.<sup>2</sup> As a matter of practice, the concept of ‘jurisdiction’ is discussed against the backdrop of very specific circumstances.<sup>3</sup> The upshot of this development is twofold. First, we have so far elaborated the meaning of jurisdiction in cases where intuition suggests that applying international human rights law is somehow exceptional.<sup>4</sup> Second, the fact that territorial and jurisdictional relationships between states and individuals are discussed at the same time

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<sup>1</sup> See, eg, M. Gondek, *The Reach of Human Rights in a Globalising World: Extraterritorial Application of Human Rights Treaties* (2009); M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011); K. Da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2012).

<sup>2</sup> This definition is derived from, but not identical to, the one given in Milanovic, *supra* note 1, at 8, where it reads ‘[e]xtraterritorial application simply means that at the time of the alleged violation of his or her human rights the individual in concerned is not physically located in the territory of the state party in question, a geographical area over which it has sovereignty or title.’ The change is to emphasise that it is important to know what the obligations are before we speak of violations. On this point see L. Raible, ‘The Extraterritoriality of the ECHR: Why Jaloud and Pisari should be Read as Game Changers’ [2016] *European Human Rights Law Review* 161, at 165-166.

<sup>3</sup> Military operations and armed conflict abroad are a prominent context for the extraterritorial application of, at least, civil and political rights. See, e.g., *Banković v. Belgium*, Decision of 12 December 2001, [2001] ECHR (Appl. No. 52207/99); *Issa v. Turkey*, Judgment of 16 November 2004, [2004] ECHR 629; *Hassan v. UK*, Judgment of 16 September 2014, [2014] ECHR (Appl. No. 29750/09); *Al-Skeini v. UK*, Judgment of 7 July 2008, (Appl. No. 55721/07).

<sup>4</sup> The European Court of Human Rights currently operates on this assumption: *Al-Skeini v UK*, *supra* note 3, at 132.

implies that the concepts of jurisdiction and title are linked, without, specifying the nature of the relationship. Interestingly, however, whether there is or should be a particular relationship between the concepts of title to territory in public international law and jurisdiction in international human rights law specifically, has not gained much attention.<sup>5</sup> This is true even though there are quite a few instances suggesting that underlying assumptions about this relationship are actually important. Consider the following provisions and their interpretation by way of example.

Human rights instruments make reference to both territory and jurisdiction in different combinations. The International Covenant on Civil and Political Rights (ICCPR), for example mentions both concepts in its Article 2, which provides that '[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals *within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.'<sup>6</sup> A strictly textual interpretation would mean that a state needs to hold title to territory and exercise jurisdiction cumulatively, and at the same time in order for the ICCPR to apply. The Human Rights Committee (HRC), however, has interpreted this formulation disjunctively: it found that 'and' actually means 'or'.<sup>7</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) does not mention either of the concepts in its provision on general state obligations. The relevant Article 2 instead addresses international assistance and cooperation,<sup>8</sup> while the

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<sup>5</sup> S. Wallace and C. Mallory, 'Applying the European Convention on Human Rights to the Conflict in Ukraine' (2016) University of Cambridge Faculty of Law Research Paper 48/2016 <<https://ssrn.com/abstract=2845407>> is an exception to this rule. However, it is less concerned with the principle of the matter and more with the application of the incoherent case law to the situation in Eastern Ukraine.

<sup>6</sup> Emphasis my own.

<sup>7</sup> HRC, General Comment 31: Nature of the General Legal Obligations on States Parties of the Covenant, UN Doc. CCPR/C/21/Rev./Add.13 (26 May 2004), at 10-11. For an analysis of the drafting history of the provision see Gondek, *supra* note 1, at 92-105.

<sup>8</sup> On the implications for extraterritoriality see *ibid.*, at 316-28; M. Gibney and S. Skogly, 'Transnational human rights obligations' (2010) 24 *Human Rights Quarterly* 781, at 790-91; O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social, and Cultural Rights' (2012) 34 *Human Rights Quarterly* 1084; M. E. Salomon, 'Deprivation, Causation and the Law of International Cooperation' in Malcolm Langford et al. (eds.), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013). More generally see: M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), at

International Court of Justice (ICJ) held that the ICESCR imposes obligations that are ‘essentially territorial.’<sup>9</sup> The European Convention on Human Rights (ECHR or Convention), in yet another variation, relies on jurisdiction alone to demarcate its application. Article 1 of the ECHR reads as follows: ‘The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.’ An analysis of the drafting history of the ECHR, however, shows that jurisdiction was chosen as opposed to notions of nationality. The use of the phrase ‘residing within [the state’s] territory’ was discussed but ultimately dismissed and replaced with ‘within [the state’s] jurisdiction.’<sup>10</sup> The reason was to prevent the move from one problematic limitation of the reach of fundamental rights – nationals – to another one – residents.<sup>11</sup>

This short list illustrates two important aspects of the area that shape this article. First, they exemplify that the relationship between a state’s title to territory and its jurisdiction is frequently invoked, but rarely expressly addressed. Second, the examples illustrate that a number of potential relationships seem to be contemplated. The ICCPR (but not the HRC’s interpretation) seems to suggest that territory and jurisdiction are cumulative, implying that they are – at core – different. To be clear, I am not suggesting that the HRC’s take on the text of the ICCPR is inadequate or wrong.<sup>12</sup> For present purposes, this example should only be taken to illustrate that different interpretations of the ICCPR do not just imply different accounts of jurisdiction, but also entail different implications for the relationship between title

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144-50; M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), at 370-77.

<sup>9</sup> *Legal Consequences of the Construction of a Wall* (Advisory Opinion) [2004] ICJ Rep. 136, at para. 112.

<sup>10</sup> *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights* (1976) Vol. 3, at 200.

<sup>11</sup> See further the analysis in Gondek, *supra* note 1, at 84-92.

<sup>12</sup> In fact, I think that the interpretation of ‘and’ as ‘or’ is perfectly plausible, and at least not less so than the suggestion that jurisdiction and territory are different criteria to be met cumulatively. For arguments on the details of which interpretation is preferable see, eg, *Lopez Burgos v Uruguay*, Communication No 52/1979, Views of 29 July 1981, UN Doc. CCPR/C/13/D/52/1979, (Christian Tomuschat, Separate Opinion); Gondek, *supra* note 1, at 92-108; Milanovic, *supra* note 1, at 222-227; M. Den Heijer and R. Lawson, ‘Extraterritorial Human Rights and the Concept of ‘Jurisdiction’’ in M. Langford et al. (eds), *Global Justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013), at 161-162.

and jurisdiction in international human rights law. The ICESCR, on the other hand, invokes neither of the concepts as relevant, while the ICJ thought that territory is essential. There are instances where both the European Court of Human Rights (ECtHR or Court) and academic commentators insist that jurisdiction is ‘primarily territorial’, which would mean that jurisdiction is both logically and normatively connected to national territory.<sup>13</sup> At the same time, the same Court and the same authors also claim that jurisdiction in international human rights law is the very exception of territoriality, implying that jurisdiction does not only flow from territory, but at the same time constitutes a value that justifies its exceptions.<sup>14</sup> This is a peculiar connection of claims, as they cannot both be true at the same time. The fact that it is not only present but common suggests that assumptions about the relationship between title to territory and the meaning of jurisdiction are fundamentally relevant to the confusion surrounding extraterritoriality.

The starting point of this article is thus that the discussion of the relationship of the concepts of jurisdiction and title to territory could benefit from a conceptually coherent approach. In other words, the different contentions and assumptions should be organized into categories. In order to do so, I start by looking at what international law has to say about jurisdiction, as understood in international human rights law, and territory, respectively. The unsurprising, yet important, conclusion of this survey in section 2 is that the two concepts serve different normative purposes and that they are thus not the same and should be treated accordingly. However, this does not yet mean that title cannot or should not play a role in conceptualizing jurisdiction.

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<sup>13</sup> See, eg, *Banković v. Belgium*, *supra* note 3, at 59; V. P. Tzevelekos, ‘Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility’ (2014) 36 *Michigan Journal of International Law* 129, 129-30; M. Gondek, ‘Extraterritorial Application of The European Convention on Human Rights: Territorial Focus in the Age of Globalization?’ 52 *Netherlands International Law Review* 349, 360

<sup>14</sup> *Banković v. Belgium*, *supra* note 3, at 67; Tzevelekos, *supra* note 13, at 142-43; Gondek, *supra* note 13, at 359, 70.

Thus, section 3 introduces three models to organize the relationship of these different legal concepts at the stage of establishing human rights obligations of states and the yardstick against which they will be evaluated. The approximation model captures the idea that jurisdiction in international human rights law should mirror a concept of title. The differentiation model contends that the criteria that make up jurisdiction should be different depending on whether an alleged human rights violation takes place within or outside of a state's territory. The separation model, in turn, insists on conceptual distinctiveness. The section also suggests that the models should be evaluated against their fit with the relational nature of human rights. This means that any model needs to fit with the fact that international legal human rights are dependent on, and create a normative relationship between the right holder and the bearer of ensuing obligations.

Sections 4, 5, and 6 look at the three main models – approximation, differentiation, and separation – in turn. The discussion of the approximation and differentiation models suggests that title is alive and well in interpretations of jurisdiction. In order to show that this is a mistake, and that title should not influence the interpretation of jurisdiction, each model is evaluated against its fit with the relational nature of human rights. I argue that the approximation and differentiation models fail on this criterion, while the separation model fares best. Section 7 concludes.

## **2. Jurisdiction, territory, and international law**

The concepts of jurisdiction and territory are widely made use of and referred to in public international law in general and in international human rights law in particular. This section first considers the meaning of jurisdiction through the particular lens of international human rights law. This limitation of scope is necessary for a simple reason: there are many meanings of jurisdiction in international law.<sup>15</sup> The one that is of interest here is the threshold criterion

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<sup>15</sup> On this point and jurisdiction in international law generally see, e.g., R. O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept' (2004) 2 *Journal of International Criminal Justice* 735; A. Mills, 'Rethinking

that must be met by a state in relation to an individual in order for human rights obligations to arise in the first place.<sup>16</sup> In the context of general public international law this is a peculiar, if not marginal meaning of the term.<sup>17</sup> It is important that this article should not be taken to address any of the other, more prevalent meanings.

Second, territory will be considered in the context of the norms of international law that regulate title to territory by states.<sup>18</sup> Again, a note of caution is warranted: this paper only describes the relevant aspects of public international law and draws some conclusions on its implications and effects. It does not, therefore, systematically describe, let alone evaluate, the legal regime against any justifications of territorial rights.<sup>19</sup> After outlining both of these areas, the section concludes that the concepts of territory and jurisdiction in the relevant sense have very different purposes. They should thus be distinguished meticulously and any postulated relationship of these concepts, while not excluded by their distinctiveness, needs to be approached with care.

### ***2.1. Jurisdiction and international human rights law***

Much like the relationship between territory and jurisdiction, the one between jurisdiction and international human rights law is a fraught one.<sup>20</sup> The main reason seems to be that jurisdiction

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Jurisdiction in International Law' (2014) 84 *British Yearbook of International Law* 187; Cedric Ryngaert, *Jurisdiction in International Law* (2nd edn, 2015).

<sup>16</sup> See, e.g., *Lopez Burgos v Uruguay*, *supra* note 12, at paras. 12.2 and 12.3; S. Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25 *Leiden Journal of International Law* 857.

<sup>17</sup> Most works dealing with jurisdiction in international law in general terms omit it entirely. See Mills, *supra* note 15, at 194 (fn 22); Ryngaert, *supra* note 15, at 20.

<sup>18</sup> On title to territory in international law see generally M. N. Shaw (ed.), *Title to Territory* (2005); J. Crawford, *The Creation of States in International Law* (2nd edn, 2006); M. N. Shaw, *International Law* (7th edn, 2014) 352-85.

<sup>19</sup> Others have done so much more stringently and persuasively than I could. See, e.g., D. Miller, 'Territorial Rights: Concept and Justification' (2012) 60 *Political Studies* 252; F. R. Tesón, 'The Mystery of Territory' (2015) 32 *Social Philosophy and Policy* 25-50; L. Lo Coco, 'The Grounds of Territory' (PhD Thesis, King's College London 2016).

<sup>20</sup> There are about as many interpretations of the precise criteria of jurisdiction in this regard as there are judicial bodies and authors. See, e.g., the different takes in O. De Schutter, 'Globalization and Jurisdiction: Lessons from the European Convention on Human Rights' (2006) 6 *Baltic Yearbook of International Law* 183; H. King, 'The Extraterritorial Human Rights Obligations of States' (2009) 9 *Human Rights Law Review* 521; S. Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the



has many meanings.<sup>21</sup> In international (as opposed to domestic) law alone jurisdiction may refer to the competence of a court, or that of a state. It can denote the right of a state to enact domestic laws or to enforce them.<sup>22</sup> Because jurisdiction means so many different things, there are numerous potential distinctions to be drawn out. However, the crucial one in the current context is this: jurisdiction as traditionally (and still usually) conceived of in international law is a question of *right*,<sup>23</sup> whereas jurisdiction in international human rights law is a question of *duty*. This powerful thought requires some unpacking.

I owe the clear expression of the idea to Mills.<sup>24</sup> He argues that jurisdiction in international law can and should no longer be conceptualized as merely a matter of rights and powers, but also needs to be analysed as a question of duty. However, his concern is a different one from mine. He makes the argument that there are circumstances where the exercise of state jurisdiction in the traditional sense of an authority to regulate may be a duty rather than a right.<sup>25</sup> That is, his argument concerns the lack of discretion in the exercise of jurisdiction, but the underlying conception of jurisdiction as regulatory authority – that is, a right – is not affected. In the context of international human rights law, on the other hand, the distinction between jurisdiction as a question of right and jurisdiction as a matter of duty is more fundamental on a conceptual level. Let me explain.

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European Convention' (2010) 20 *European Journal of International Law* 1223; Milanovic, *supra* note 1; Besson, *supra* note 16; De Schutter et al., *supra* note 8.

<sup>21</sup> For an outline of potential interpretations and the confusion they have sown in international human rights law see Milanovic, *supra* note 1, at 19-41.

<sup>22</sup> Ryngaert, *supra* note 9-10

<sup>23</sup> See, e.g., C. Staker, 'Jurisdiction' in M. D. Evans (ed.), *International Law* (3rd edn, 2010), at 309-10; J. Crawford, *Brownlie's Principles of Public International Law* (8th edn, 2012), at 204-06, 456-57; Ryngaert, *supra* note 15.

<sup>24</sup> Mills, *supra* note 15. For the same distinction, but not as general, see Milanovic, *supra* note 1, at 53, 118; see also Gondek, *supra* note 13, at 369-70.

<sup>25</sup> Mills, *supra* note 15, at 209-230.

Whenever jurisdiction features in international human rights treaties, it is generally (and arguably most aptly) thought of as a threshold criterion.<sup>26</sup> That is, if a state is to have human rights obligations towards particular individuals that state must have jurisdiction over them. Only when this is established does it mean that the individuals are to have rights against that state and the state is to incur the respective human rights obligations.<sup>27</sup> When a state has jurisdiction according to, say, the ECHR or the ICCPR, human rights obligations arise regardless of whether that state had a right to do or omit what it did. In Mills' words: 'A state in unlawful occupation of territory may thus be subject to jurisdictional *obligations* under human rights law, even though it lacks jurisdictional *rights* as a matter of general international law.'<sup>28</sup>

It follows that, international human rights law is agnostic towards the question of whether a state acts lawfully or whether it respects the sovereignty of other states in 'exercising'<sup>29</sup> its jurisdiction.<sup>30</sup> In addition, if and when a state meets the criteria of jurisdiction, that state then, strictly speaking, has no discretion regarding the applicability of its human rights obligations. Put differently: once jurisdiction is established, international human rights instruments apply and the question of whether the state *accepts* its obligations under any such instrument is irrelevant. And it is even less relevant whether said state has any jurisdictional rights over the same situation. As the argument unfolds, we will see that this distinction between jurisdiction as a question of right and jurisdiction as a question of duty is crucial.

In sum, jurisdiction in international human rights law is a matter of duty in the sense that it sets out criteria (whatever those may be), that, when met, trigger human rights obligations

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<sup>26</sup> M. O'Boyle, 'The European Convention on Human Rights and Extraterritorial Jurisdiction: A Comment on "Life after Banković"' in Fons Coomans and Menno T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004) 125; Milanovic 19; Besson 862.

<sup>27</sup> Besson 862-63

<sup>28</sup> Mills, *supra* note 15, at 194 fn 22 (emphasis in original).

<sup>29</sup> This phrasing is misleading because it suggests that a state is exercising a right or power when this need not necessarily be true. In my view, jurisdiction in international human rights law does not depend on whether it is *exercised*: Raible, *supra* note 1, at 165-166.

<sup>30</sup> Contra *Banković v. Belgium*, *supra* note 3, at 59. See Milanovic, *supra* note 1, at 39-41.

of a state towards an individual. Accordingly, it is crucial at the very beginning of an inquiry into human rights violations: whether or not there is an obligation to be violated depends on whether the state had jurisdiction. This is important because no one, not even a state, can violate an obligation it does not have.<sup>31</sup> While not always spelled out in this fashion, jurisdiction in international human rights law has the function and purpose to trigger obligations of states towards individuals.<sup>32</sup> As we will see after the discussion of territory that is to follow, it is precisely this purpose that makes the relationship with territory more complicated than is sometimes acknowledged.

## ***2.2. Title to territory in public international law***

For our purposes, a brief and selective outline of international law of territory suffices.<sup>33</sup> The three essential areas of interest are the following: the definition of a state, states' territorial integrity, acquisition and loss of territory, and territory as a source of sovereignty. Traditionally, international law defines States as its subjects to consist of a defined territory with a permanent population ruled by an independent government.<sup>34</sup> According to this, States are essentially territorial entities.<sup>35</sup> Even though there are doubts as to how important territory really is as a separate criterion of statehood, 'a certain coherent territory effectively governed' remains central.<sup>36</sup>

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<sup>31</sup> On the relevance of this point see Raible, *supra* note 1, at 166.

<sup>32</sup> It could, and probably should, be argued that jurisdiction is thus an unfortunate choice of term for the purposes of human rights law. However, it seems it is what we are left with for now.

<sup>33</sup> This is a simplified account in order to keep distractions from the purpose of this paper to a minimum. For more on territory in international law see Shaw, *Title to Territory*, *supra* note 18; Crawford, *supra* note 18; Crawford, *supra* note 23, at 203-52; Shaw, *International Law*, *supra* note 18, at 352-400.

<sup>34</sup> See Article 1 of the Montevideo Convention on the Rights and Duties of States (signed 26 December 1933) 165 LNTS 19.

<sup>35</sup> See Crawford, *supra* note 18, at 46-52; Tesón, *supra* note 19, at 28. The opposite, however, is not true. International law recognises categories of territories that do not form part of a state in this sense. See generally Crawford, *supra* note 23, at 203.

<sup>36</sup> Crawford, *supra* note 18, at 52.

When it comes to acquisition and transfer of territory of states international law treats it not entirely unlike property.<sup>37</sup> States can acquire territory either originally or derivatively.<sup>38</sup> Original acquisition occurs when a state occupies territory, that is, when it yields relatively uncontested and effective jurisdictional powers<sup>39</sup> in a particular territory.<sup>40</sup> States acquire territory derivatively through cession. The reason for a cession can be a sale or a political decision by the ceding state. However, in both cases the derivatively acquired title is only valid if the title of the ceding state was valid as well. The upshot is that title, understood as ‘the validity of claims to territorial sovereignty against other states’,<sup>41</sup> is central in any case.<sup>42</sup> This last statement illustrates that the notion of title to territory is intimately linked to sovereignty, as title comprises its ‘essence’.<sup>43</sup>

The concept of title in international law exhibits a strong preference for the status quo.<sup>44</sup> This is manifested the following principles, among others. First, consistent use of and effective exercise of state functions over a territory, are central notions that almost always bear a decisive effect in determining such title.<sup>45</sup> Second, international law upholds territorial integrity of (existing) states, as evidenced by article 2(4) of the UN Charter.<sup>46</sup> The principle is particularly important in discussions about secessions.<sup>47</sup> Further evidence of the importance of territorial integrity may be found in the fact that coerced territorial transfers – such as conquests – while prohibited today, were (and are) the source of valid title to territory if they occurred before

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<sup>37</sup> Crawford, *supra* note 23, at 216, but see the note of caution at 204; Tesón, *supra* note 19, at 28.

<sup>38</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep. 12, at paras. 79-80.

<sup>39</sup> *Island of Palmas Case (Netherlands v. US)* (1928) RIAA 829. Note that this is precisely *not* the prevailing meaning of jurisdiction in international human rights law.

<sup>40</sup> Shaw, *International Law*, *supra* note 18, at 363-72; Tesón, *supra* note 19, at 28.

<sup>41</sup> Crawford, *supra* note 23, at 212.

<sup>42</sup> *Ibid.*, at 216-17.

<sup>43</sup> Shaw, *International Law*, *supra* note 18, at 354.

<sup>44</sup> Tesón, *supra* note 19, at 29.

<sup>45</sup> Shaw, *Title to Territory*, *supra* note 18, at xxiii-xxiv; Tesón, *supra* note 19, at 29.

<sup>46</sup> See further M. W. Zacher, ‘The Territorial Integrity Norm: International Boundaries and the Use of Force’ (2001) 55 *International Organization* 215. On the acquisition of territory by newly creating/ed states see generally Crawford, *supra* note 18; Shaw, *International Law*, *supra* note 18, at 355-58.

<sup>47</sup> L. Brilmayer, ‘Secession and Self-determination: A Territorial Interpretation’ (1991) 16 *Yale Journal of International Law* 177.

1928, when the Kellogg-Briand Pact<sup>48</sup> was signed.<sup>49</sup> The fact that international law concerning territory favours the status quo by focusing on historical effectiveness<sup>50</sup> is a consequence of its purpose. It performs the important function of creating and upholding international stability. In doing so, international law in practice avoids the crucial questions of legitimacy and acts as a workable arbiter in case of territorial disputes.<sup>51</sup> The focus on effectiveness and the favouring of the status quo might be morally flawed,<sup>52</sup> but make sense in light of the purpose of this area of law.

Contrast this analysis with what was said about jurisdiction in international human rights law by revisiting the distinction between jurisdiction as right and jurisdiction as a trigger of duty.<sup>53</sup> Title to territory is about the validity of claims by a particular State. It is related to the conception of jurisdiction as powers and rights, as regulatory authority of states, dependent as it is, on the effective exercise of exactly these powers. In other words, jurisdiction here refers to a right of a state to exercise regulatory authority. It allocates rights, and is thus agnostic as to whether a state actually exercises its authority.<sup>54</sup> However, jurisdiction in this sense has little to no obvious resemblance to jurisdiction as it is understood in international human rights law. One could say that either or both of these legal conceptions are impractical, or morally flawed. However, this is a moot point. The opposing conceptions are simply a consequence of the purpose of each area of law. The international law on territory, as we have seen, maintains a minimum of stability by upholding exclusive claims by States. The purpose of jurisdiction in international human rights law, on the other hand, is to act as a threshold criterion for human

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<sup>48</sup> Also known as Pact of Paris. Formally: General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928) 94 LNTS 57.

<sup>49</sup> See Crawford, *supra* note 23, at 216.

<sup>50</sup> To my mind, it is in light of this no coincidence that Crawford treats effectiveness as the decisive feature of statehood as such: Crawford, *supra* note 18, at 37-95.

<sup>51</sup> Tesón, *supra* note 19, at 28-29.

<sup>52</sup> As a consequence, many philosophical justifications of territorial rights are in opposition to international law. See, e.g., *ibid.*, at 30-31; Lo Coco, *supra* note 19.

<sup>53</sup> See section 2.1 *supra*.

<sup>54</sup> Although, and this is the heart of Mills' argument, there are areas where should now be acknowledged that the exercise of jurisdiction in this sense may not only be a right, but also a duty. See Mills, *supra* note 15, at 209-230.

rights obligations. Accordingly, and unlike the law on territory, it is not only guided by practical considerations, but it also relies on moral accounts of what human rights law does and is.

None of this is to say a priori that the two concepts have nothing to do with each other or that interpretations of jurisdiction that rely on notions inspired by or related to title to territory are necessarily flawed. Similarly, I have not yet shown that there are, as a matter of fact, interpretations of jurisdiction that do rely on title. What this section has shown is the following. Title to territory and jurisdiction in international human rights law serve different purposes. These different purposes call for a careful analysis of the relationship and for criteria to arbitrate between different models of said relationship. The next section takes up this task. I introduce three models to organise existing claims about the relationship of jurisdiction and territory as well as an argument in favour of the relational nature of human rights as an evaluative yardstick.

### **3. Three models and their evaluation**

#### ***3.1. Models***

The introduction to this paper mentioned a few examples of contentions about or relating to the relationship of territory and jurisdiction. We have reached the stage of organising these claims into models. The approximation model is one that defends that jurisdiction in international human rights law is for all intents and purposes a mirror of title to territory. The differentiation model bundles claims to the effect that the criteria making up jurisdiction depend on whether the relevant situation is found within or outside of the territory of the state, whose jurisdiction is in question. The separation model maintains that jurisdiction in international human rights law and title to territory are conceptually entirely separate and that similarities – if any – are not due to the fact the jurisdiction is related to title. Not present as a model of the relationship is the idea that human rights treaties apply only within a state's

territory. The reason is that this particular contention to my mind has already been thoroughly analysed and rejected by leading authors in this field.<sup>55</sup> The same is not true for the models discussed here.

Importantly, and in line with the purpose of jurisdiction in international human rights law identified above,<sup>56</sup> the models I propose address the stage of the establishment of the human rights obligations of a state. The models represent positions along the spectrum of how much title to territory impacts (or should impact) the meaning of jurisdiction, conceptually speaking. Put differently, these models are claims about how the concept of title to territory affects the criteria making up the meaning of jurisdiction in international human rights law.<sup>57</sup> An example of such a claim is that, depending on whether or not an alleged human rights violation takes place within or outside a state's territory, different thresholds should apply. These models serve as organizing tools for the exploration of the following questions: How and why does title to territory linger on in interpretations of jurisdiction? And, if it does, should it?

It is worth noting that not all claims about the relationship between the concepts of title to territory and jurisdiction are dealt with in these models. In other words, not all claims about the relationship pertain to whether title and the trigger of obligations have anything in common. By way of example consider Besson's idea that a State's jurisdiction is *presumed* in relation to individuals present within domestic territory of that state.<sup>58</sup> This is a claim about how territory and, ultimately, title influence how a court should assess whether or not a State has jurisdiction.

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<sup>55</sup> See, e.g., E. Benvenisti, 'The Applicability of Human Rights Conventions to Israel and to the Occupied Territories' (1992) 26 *Israel Law Review* 24; O. Ben-Naftali and Y. Shany, 'Living in Denial: The Application of Human Rights in the Occupied Territories' (2004) 37 *Israel Law Review* 17; R. Wilde, 'Legal Black Hole – Extraterritorial State Action and International Treaty Law on Civil and Political Rights' (2004) 26 *Michigan Journal of International Law* 739; Gondek, *supra* note 1, at 368; Milanovic, *supra* note 1, at 58-61. For an opposing view regarding times of armed conflict and occupation see M. J. Dennis, 'Application of Human Rights Treaties Extraterritoriality in Times of Armed Conflict and Military Occupation' (2005) 99 *American Journal of International Law* 119.

<sup>56</sup> Section 2.1 *supra*.

<sup>57</sup> It would be perfectly possible to investigate the opposite perspective where one would ask how much the concept of title to territory in international law can or should be influenced by jurisdiction in international human rights law. However, this is not the point of this paper.

<sup>58</sup> Besson, *supra* note, at 876-77 (emphasis my own).

It is, in Besson's words, a question of evidence rather than concept.<sup>59</sup> While this is an interesting and important issue, the present article does not address it. Instead, it focuses on the question of whether and how title to territory can or should inform the interpretation of jurisdiction in international human rights law as a trigger of obligations.

### ***3.2. Method of evaluation: the relational nature of human rights***

A note on the method of evaluation is warranted. The use of models is helpful because it allows to bundle different claims about jurisdiction according to how they make use of title to territory. In turn, this illustrates that title to territory continues to influence the interpretation of jurisdiction. However, the article also aims to show that a conflation, or even unwarranted combination, of title and jurisdiction should be avoided. In order to analyse which of the three models is preferable, we need to know what makes a model of the relationship of jurisdiction and territory successful.

I submit that an evaluation has to be connected to a theory of international legal human rights, and in particular their relational nature. The reason is that the impact of notions of title on jurisdiction in international human rights law affect the stage in the analysis that concerns the establishment of human rights obligations of states in the first place. That is, we are interested in how international human rights law allocates obligations to states, and how this allocation is justified.

The allocation and justification of obligations is a necessary part of human rights. As rights, their very purpose is to give the right holder a claim against the duty bearer.<sup>60</sup> Rights, and thus human rights, need to explain and justify two things in particular. First, they need to explain why an agent other than the right-holder must shoulder the burdens of ensuing

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<sup>59</sup> Ibid., at 876

<sup>60</sup> See generally, W. N. Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16. See further L. Wenar, 'The Nature of Rights' (2005) 33 *Philosophy & Public Affairs* 223; L. Wenar, 'The Nature of Claim-Rights' (2013) 123 *Ethics* 202.



obligations for the sake of the former. Second, human rights need to be supplied with reasons that justify the allocation of these obligations to one duty-bearer (or a set of duty-bearers) rather than another. In the context of extraterritoriality, this means that we need to ask why international human rights law would insist on the allocation of duties to a particular state, be it the territorial one or not. In other words, the issue of extraterritoriality is really a question of how to identify the relevant duty-bearer in relation to a particular right-holder.

However, international legal human rights are relational in more than one sense: they are normative relationships between a right-holder and a duty-bearer,<sup>61</sup> but they are also dependent on a pre-existing relationship between the two. The latter relationship is what allocates the arising obligations to a particular duty-bearer (or duty-bearers). It is also what justifies this allocation. When we consider the meaning of jurisdiction in international human rights law and how the concept of title to territory should influence it we are concerned with characterizing that pre-existing relationship.<sup>62</sup>

This is true regardless of which particular account of international legal human rights one favours. So far, it seems, authors who disagree on the nature and function of international human rights also disagree on the precise meaning of jurisdiction. Contrast the views of Milanovic and Besson, for example. Milanovic bases his analysis of extraterritoriality on an understanding of human rights that treats them as (a) enshrining outcomes that are important for individuals' wellbeing, and thus desirable in and of themselves,<sup>63</sup> and (b) allocating resulting obligations to the actor who has the capacity to bring about the desired outcome at

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<sup>61</sup> On the importance of the identification of the duty-bearer in general see, e.g., S. Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights: A Quiet (R)Evolution?' (2015) 32 *Social Philosophy and Policy* 244.

<sup>62</sup> I have argued elsewhere that jurisdiction is best understood as political power. See Raible, *supra* note 1, at 166-168. However, the *purpose* of jurisdiction remains the same regardless of which particular interpretation one prefers, and it is this purpose that is decisive.

<sup>63</sup> Milanovic explicitly endorses this view. But he does not do so in the same place where he is interpreting the meaning of jurisdiction. See Milanovic, *supra* note 15, at 107, 109.

the least cost.<sup>64</sup> This combination of claims it is what allows him to differentiate between the extraterritoriality of negative and positive human rights obligations in his now famous “third model”.<sup>65</sup>

Besson, on the other hand, treats human rights as rooted in the equal political status of individuals and thus tied to political membership.<sup>66</sup> Her account stresses that, because of this reliance on political equality, some form of membership in a political community is required if an individual is to have claims against institutions of that community. This impacts directly on her account of the meaning of jurisdiction, which she argues is best understood as *de facto* legal and political authority.<sup>67</sup>

None of this shows which account of human rights, if any, is preferable. But it does show that the following. While the details of the interpretation of jurisdiction hinge on the substantive account of human rights employed, jurisdiction’s function does not. Any plausible account needs to explain who the right-holder is, who bears corresponding duties, and how this allocation is justified. In other words, regardless of what theory of human rights one prefers, it is necessary to allocate human rights obligations, and this is what jurisdiction is about. For this reason, the models introduced here are evaluated against their fit with the relational nature of human rights. That is, a good model of the relationship of jurisdiction and territory will fit with the reason why the interpretation of jurisdiction is so central. The better the model fits, the more successful it is.

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<sup>64</sup> Implicitly: *ibid.*, at ch 4. Explicitly: M. Milanovic, ‘Human Rights Treaties and Foreign Surveillance: Privacy in a Digital Age’ (2015) 56 *Harvard International Law Journal* 81, at 111. For more on the least-cost-principle and how it allocates duties see L. Wenar, ‘Responsibility and Severe Poverty’ in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (2007).

<sup>65</sup> Milanovic has been criticized – again implicitly – for not following through on the capacity plus least-cost-principle. See Y. Shany, ‘Taking Universality Seriously: A Functional Approach to Extraterritoriality in International Human Rights Law’ (2013) 7 *Law & Ethics of Human Rights* 47, at 61-64.

<sup>66</sup> See generally S. Besson, ‘Human Rights and Democracy in a Global Context: Decoupling and Recoupling’ (2011) 4 *Ethics & Global Politics* 19.

<sup>67</sup> Besson, *supra* note 16, at 862-866.

#### 4. The Approximation Model

An approximation or mirroring of jurisdiction to title to territory is most clearly visible where the claim is that jurisdiction is ‘primarily territorial.’<sup>68</sup> This assertion does rarely stand alone, however. Sometimes it goes hand in hand with the idea that jurisdiction, as a consequence of its territoriality, cannot mean anything else than effective control over territory and that this is true for extraterritorial jurisdiction as well.<sup>69</sup> It is also sometimes followed by the claim that as a consequence of its territoriality jurisdiction must be limited by the sovereign rights of other states.<sup>70</sup>

The upshot of these propositions is that jurisdiction in international human rights law, even if it is conceptualized as a threshold criterion for the treaties’ application, is essentially and necessarily inspired by the criteria usually thought to establish title to territory, the most important of which is effective governance.<sup>71</sup> In other words, the consequence of these claims is that jurisdiction as a threshold criterion should be a close approximation of at least some of the criteria generally used to establish title to territory. What follows unpacks the claim that jurisdiction is best understood as an approximation of the title-inspired criterion of effective control over territory and that jurisdiction as approximation of title needs to be exclusive.

Consider, first, the problem of effective control over territory as a criterion for jurisdiction. The ECtHR introduced it in *Banković v. Belgium*,<sup>72</sup> and it remains alive and well in later judgments, such as *Al-Skeini v. UK*.<sup>73</sup> The *Banković* decision concerned the applications of individuals whose relatives were killed in the bombing of a radio and television station in Belgrade. The ECtHR found their case inadmissible because – among other reasons – the states

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<sup>68</sup> (In)famously coined in *Banković v. Belgium*, *supra* note, at 59. See also *Legal Consequences of the Construction of a Wall*, *supra* note, at 109. See further R. Wilde, ‘Triggering State Obligations Extraterritorially: The Spatial Test in Certain Human Rights Treaties’ (2007) 40 *Israel Law Review* 503; Miller, *supra* note 20; Tzevelekos, *supra* note 13.

<sup>69</sup> See generally Tzevelekos, *supra* note 13.

<sup>70</sup> *Banković v. Belgium*, *supra* note 3, at 59.

<sup>71</sup> See section 2.1 *supra*.

<sup>72</sup> *Banković v. Belgium*, *supra* note 3.

<sup>73</sup> *Al-Skeini v. UK*, *supra* note 3, at 138-140.

who carried out the aerial attack lacked effective control over the territory in question.<sup>74</sup> The basic idea of this interpretation of jurisdiction is that one of the instances where a state party to the ECHR incurs human rights obligations towards individuals abroad is the case of effective control over territory.<sup>75</sup>

This interpretation of jurisdiction has been heavily criticized by scholars for a range of different reasons. Milanovic is not entirely opposed, but nevertheless suggests that it should not apply to negative human rights obligations;<sup>76</sup> at least in part because the effective control criterion produces arbitrary results.<sup>77</sup> Tzevelekos goes further and argues that the criterion does not only produce arbitrary outcomes, but also lacks a basis in the Convention as it can only be traced to the law of state responsibility.<sup>78</sup> Shany considers the criterion as developed in *Banković* arbitrary because it does not seem to follow from any cogent normative principles to speak of.<sup>79</sup> In sum, the criticism so far is that effective control over territory as an interpretation of jurisdiction in international human rights law is not satisfactory in terms of the outcomes it entails.

To complement these criticisms, I want to draw attention to the implicit use of the approximation model. Constructing jurisdiction in international human rights law as effective control over territory usually<sup>80</sup> starts with the assumption that jurisdiction is as a virtual extension of title to territory.<sup>81</sup> This is apparent in the first step of this type of analysis, namely

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<sup>74</sup> *Banković v. Belgium*, *supra* note 3, at 75.

<sup>75</sup> This spatial model is just one of the concepts the Court currently operates with. The other one is the personal model, where authority over individuals is decisive. However, I have argued elsewhere that these were never meaningfully separate and that the Court has recently (hopefully) confirmed this, albeit implicitly. See Raible, *supra* note 1, at 164-165.

<sup>76</sup> Milanovic, *supra* note 1, at 209-22.

<sup>77</sup> *Ibid.*, at 170-72.

<sup>78</sup> For a summary of his view see Tzevelekos, *supra* note 13, at 133-34.

<sup>79</sup> Shany, *supra* note 65, at 60.

<sup>80</sup> A notable exception is Besson, who aligns herself with the separation model (see section 6 below) but nevertheless argues for jurisdiction to contain an element of effective control (among other elements). See Besson, *supra* note 16, at 872.

<sup>81</sup> This is in addition to the ubiquitous conflation of jurisdiction and state responsibility. See further Milanovic, *supra* note 1, at 41-52. For an opposite view see J. M. Rooney, 'The Relationship between Jurisdiction and Attribution after *Jaloud v. Netherlands*' (2015) 62 *Netherlands International Law Review* 407.

the claim that jurisdiction is primarily territorial.<sup>82</sup> There are two ensuing problems with this starting point. First, it assumes – wrongly<sup>83</sup> – that jurisdiction in international human rights law is a question of right, that is, of what a state has the international legal authority to do. This cluster of meanings of jurisdiction is connected to title to territory in a particular way: they are perceived to flow from it because territory is both a precondition and a source of sovereignty and jurisdiction is a particular subset of sovereign rights.<sup>84</sup> This first misunderstanding about the function of jurisdiction leads to the second one, which is to derive the criteria necessary for jurisdiction from the criteria to establish title to territory. In other words, the next step is to mirror the test used to establish original title to territory – that is – habitual and effective control and exercise of jurisdictional functions.<sup>85</sup> Effective control over territory is the interpretation of jurisdiction that follows from this model.

Further, there is the idea that jurisdiction in international human rights law is both limited by and limiting the sovereignty of other States.<sup>86</sup> It builds on the misunderstanding of jurisdiction as a right as opposed to a question of duty: it can only possibly limit or even displace the rights of other states if it is a right itself. The connection of this claim to the notion of title to territory is that it strives to mirror not only the criteria to be met for original acquisition of territory but also the purpose of the legal regime governing them. Even if the claims to territorial title are usually relative and in disputes title is awarded to whichever state has the better or best claim, the very purpose of the notion of title is that – once awarded or accepted – it is exclusive.<sup>87</sup> Just like the purpose of sovereignty, the purpose of this understanding is to maintain stability in a statist order. The question thus becomes: should this

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<sup>82</sup> *Banković v. Belgium*, *supra* note 3, at 59; Gondek, *supra* note 13, at 360; Tzevelekos, *supra* note 13, at 129-30.

<sup>83</sup> See section 2.2 *supra*.

<sup>84</sup> Crawford, *supra* note 23, at 204; Shaw, *International Law*, *supra* note 18, at 352-54. See also N. Bhuta, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law' in N. Bhuta (ed.), *The Frontiers of Human Rights* (2016).

<sup>85</sup> Crawford, *supra* note 23, at 225-26; Shaw, *International Law*, *supra* note 18, at 363-72

<sup>86</sup> *Banković v. Belgium*, *supra* note 3, at 59.

<sup>87</sup> Shaw, *International Law*, *supra* note 18, at 354-55.

purpose, which is almost entirely foreign to international human rights law, influence our understanding of jurisdiction as a threshold criterion to apply it?<sup>88</sup>

The success criterion introduced above provide an answer. I argue that the approximation model does not fulfil this criterion for the following reasons. It does not take into account the crucial difference between the exercise of jurisdiction as a right and the use of jurisdiction as a criterion for the application of a duty.<sup>89</sup> This means, in turn, that it does not fit a relational account of human rights. The reason is that the approximation model is unable to treat jurisdiction as a threshold criterion for the application of human rights because it ultimately subordinates jurisdiction to territory instead of using title to inform the meaning of jurisdiction. In terms of reasoning the law of territory cannot serve as an inspiration to characterize a relationship between a state and individuals.

None of this is to say that an interpretation of jurisdiction in international human rights law cannot ever rely on a notion of control over territory. It does mean, however, that in reaching this conclusion, the idea that jurisdiction is an extension of territory obscures rather than clarifies what should be at stake. The essence of title, as it were, cannot and should not be introduced into the interpretation of jurisdiction. The verdict on the approximation model is thus that it fails our evaluation and that we should look elsewhere when seeking to elucidate the relationship between jurisdiction and title to territory.

## **5. The Differentiation Model**

The differentiation model maintains that jurisdiction as found in international human rights law should be determined with reference to different criteria depending on whether or not the State in question has title to the territory where the alleged human rights violation takes place. Versions of the differentiation model include the idea that title to territory makes up for criteria

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<sup>88</sup> But see Bhuta, *supra* note 84, who argues that human rights actually rely on a statist system and states' legal systems.

<sup>89</sup> See section 2.1 *supra*.

of jurisdiction that are not fulfilled; for example a lack in actual power by the state over territory or a situation in general.<sup>90</sup> The differentiation model could also result in the claim that as long as a state has title to a particular territory, it does not need jurisdiction in order for its human rights obligations to arise. Finally, it could translate into the contention that title always results in jurisdiction, regardless of whether the latter's criteria are met or not, while the same is not true extraterritorially. This section unpacks these claims and their consequences for the interpretation of jurisdiction before evaluating them against the criteria established above.

Traces of all of these claims are most prominently found in the ECtHR judgments in *Ilașcu v. Moldova and Russia*<sup>91</sup> and *Catan v. Moldova and Russia*.<sup>92</sup> In both cases, the Court had to determine who had jurisdiction in Transdniestria for the purposes of applying the ECHR. As a consequence of the conflict between Russia and Moldova following the dissolution of the USSR, Transdniestria declared itself the Moldovan Republic of Transdniestria (MRT). However, the status of the territory remains unresolved. The MRT is not recognized as a state and Moldova maintains that the MRT is part of Moldovan territory.<sup>93</sup> At the same time, the ECtHR considered it established that the MRT is under the effective authority and control of Russia.<sup>94</sup> As the MRT is not party to the ECHR, the Court had to decide whether it was Moldova or Russia that had jurisdiction over the applicants, which in both cases alleged their human rights were violated in the MRT.<sup>95</sup>

The ECtHR found that Russia had jurisdiction because of its effective authority within the MRT,<sup>96</sup> which fits well with the case law discussed above.<sup>97</sup> However, the Court also held that Moldova retained jurisdiction for the purposes of certain human rights obligations towards

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<sup>90</sup> For an argument to that effect see K. Mujezinović Larsen, 'Territorial Non-Application' of the European Convention on Human Rights' (2009) 78 *Nordic Journal of International Law* 73-93

<sup>91</sup> *Ilașcu v. Moldova and Russia*, Judgment of 8 July 2004, [2004] ECHR (Rep. 2004-VII).

<sup>92</sup> *Catan v. Moldova and Russia*, Judgment of 19 October 2012, [2012] ECHR (Appl. No. 43370/04).

<sup>93</sup> *Ilașcu v. Moldova and Russia*, *supra* note 91, at 2, 322-330.

<sup>94</sup> *Ibid.*, at 386-394.

<sup>95</sup> *Ibid.*, at 2: *Catan v. Moldova and Russia*, *supra* note 92, at 3.

<sup>96</sup> *Ilașcu v. Moldova and Russia*, *supra* note 91, at 386-394.

<sup>97</sup> Section 4 *supra*.

individuals in the MRT even though it lacked effective control over the territory.<sup>98</sup> Here is what the Court had to say about the latter finding in *Ilașcu*:

On the basis of all the material in its possession, the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under the effective control of the “MRT”. ... However, even in the absence of effective control over the Transdnistrian region, Moldova still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the Convention.<sup>99</sup>

Admittedly, in the light of this article’s purpose and particularly from the point of view of public international law, this quote does not make a lot of sense. After all, whether or not a particular government is considered legitimate or whether a government as opposed to a state is recognized, has no necessary bearing on title to territory.<sup>100</sup> What the Court may have meant to say instead becomes clearer upon consulting the relevant passages in *Catan*, however:

Although Moldova has no effective control over the acts of the “MRT” in Transdnistria, the fact that the region is recognised under public international law as part of Moldova’s territory gives rise to an obligation, under Article 1 of the Convention...<sup>101</sup>

Again, the choice of words is unfortunate because it invites conflation of the notion of title with the concept of recognition of states.<sup>102</sup> Nevertheless, in my view the most sensible interpretation of this latter statement is that the ECtHR means to say the following. Moldova has, as a matter of international law, title to the territory of the MRT and retains jurisdiction and human rights obligations towards its population, albeit only a subset, as a direct consequence of this fact.

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<sup>98</sup> *Ilașcu v. Moldova and Russia*, *supra* note 91, at 33-335.

<sup>99</sup> *Ibid.*, at 330-331.

<sup>100</sup> For a summary on recognition of governments see Shaw, *International Law*, *supra* note 18, at 328-32.

<sup>101</sup> *Catan v. Moldova and Russia*, *supra* note 92, at 110 (citing *Ilașcu v. Moldova and Russia*, *supra* note 91).

<sup>102</sup> On recognition of states see Crawford, *supra* note 18, at ch 1; J. Vidmar, ‘Explaining the Legal Effects of Recognition’ (2012) 61 *International and Comparative Law Quarterly* 361; Shaw, *International Law*, *supra* note 18, at 321-28.



This means that Moldova's title to the territory comprising the MRT in the view of the Court made up in part for what Moldova lacked in actual control. In turn, this implies that as long as a state has title, the requirements for jurisdiction under the ECHR may be reduced or altered.<sup>103</sup> The more general implication is that the concrete meaning of jurisdiction and its criteria actually differ depending on whether the state to be held accountable has title to the territory in question. In other words, the differentiation model differentiates between the criteria of jurisdiction within the territory a state has title to and the criteria of jurisdiction outside of it.

How does the model fare in the context of the interpretation of jurisdiction when tested against our evaluative criterion? The main problem the differentiation model faces is the assumption that the relationship between individuals and states that allocates human rights duties is characterised by the state's relationship with a particular territory. Much like the approximation model, the differentiation model conceptualises jurisdiction as a form of upshot of territory.<sup>104</sup> It is only possible to claim that title makes up for whatever one lacks in jurisdiction if one also assumes that their criteria overlap and – importantly – have the same purpose.<sup>105</sup> At this point, it becomes clear that title to territory has not yet been deployed to interpret jurisdiction in line with relational accounts of human rights. This would only be successful if one could first establish that title to territory is a vital part of the state's relationship with individuals that justifies human rights.<sup>106</sup> The differentiation model does not fit well with the relational nature of human rights for much the same reasons as the approximation model. This means that the differentiation model fails and – along with the conclusions in *Ilașcu* and *Catan* – should be rejected.<sup>107</sup>

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<sup>103</sup> See also Mujezinović Larsen, *supra* note 90.

<sup>104</sup> See *ibid.*, at 76-78, where he conflates jurisdiction as a right and jurisdiction as an issue of duty, while arguing overall, for what I would call the differentiation model. Cf. Milanovic, *supra* note 1, at 118.

<sup>105</sup> On the differing purposes of the two legal concepts see section 2. *supra*.

<sup>106</sup> This is what I hope to be a faithful extension of the view in Besson, *supra* note 16, at 860.

<sup>107</sup> Similar, but for different reasons: Milanovic, *supra* note 1, at 118.

To sum up, the differentiation and the approximation models both fail for similar underlying reasons. Problematically, these accounts confuse jurisdiction as a right with jurisdiction as a trigger of duties.<sup>108</sup> The approximation model does so more openly and consistently than the differentiation model. However, both allow title to territory to largely dictate the criteria of jurisdiction without establishing that it captures something about the pre-existing relationship between States and individuals necessary for human rights to apply. In other words, they fail to account for the purpose of jurisdiction and ultimately they cement rather than lift the confusion surrounding it. This leaves us with the separation model, which is considered next.

## **6. The Separation Model**

The separation model maintains that jurisdiction in international human rights law and title to territory should be conceptually separated and that similarities – if any – should not be taken for granted, let alone established with a view to territory. This model thus results in the view that title to territory does not and should not impact criteria of jurisdiction. It follows that a state that has title to a particular territory does not necessarily have jurisdiction. And even if the criteria for both of these concepts end up being similar, the reason is not that title impacts the interpretation of jurisdiction. Say, for example, jurisdiction is interpreted to mean effective control over an area.<sup>109</sup> In a paradigmatic instance of a State, this would mean that it has jurisdiction over the entire territory it has title to and in addition to that over any area it controls effectively through whatever means.<sup>110</sup> As long as the *reason* for the adoption of these criteria is tailored to the purpose of each area of law and the results arrived at independently, this is still fall under the separation model.

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<sup>108</sup> See section 2.1 above.

<sup>109</sup> As mentioned above, this is not the only way it can or has been interpreted. But the ECtHR continues to hold that it is relevant: *Al-Skeini v. UK*, *supra* note 3, at 130-139.

<sup>110</sup> Examples include *Loizidou v. Turkey*, Judgment (Preliminary Objections) of 23 March 1995, [1995] ECHR (Appl. No. 15318/89), at 60-64; *Al-Skeini v. UK*, *supra* note 3, at 130-139.

The last paragraph already implies that, in terms of result at least, instances of the separation model are widespread, even in the case law of the ECtHR.<sup>111</sup> Beyond that, the HRC has been particularly clear. In *Lopez Burgos* it has been very forthcoming in basing the meaning of jurisdiction on a State's relationship with an individual, leaving the notion of territory or title out of the equation.<sup>112</sup> This fits perfectly well with its disjunctive interpretation of article 2 ICCPR.<sup>113</sup> Even *Al-Skeini* – the ECtHR's (still) leading case on the principles of jurisdiction – can be interpreted to be arrived at independently of territory. This is true not only of the spatial model mentioned above, but in particular also of the personal model of jurisdiction, which is based on control over an individual instead of territory.<sup>114</sup>

However, the Court still heads its statement of principles with what it refers to as '[t]he territorial principle'.<sup>115</sup> This principle perpetuates the idea that jurisdiction in the ECHR flows from territory. In other words, the ECtHR reaches results that are disconnected from the substance of its reasoning. While I have argued elsewhere that a charitable interpretation of the ECtHR's case law on extraterritoriality may remedy some of its flaws,<sup>116</sup> I also think that the lack of discernible, adequate reasoning is an indication of serious problems with the case law.<sup>117</sup> In particular, it means that (implicit) use of the approximation and differentiation models, and thus the failure to meet the success criteria postulated here, lingers on. The numerous inconsistencies in human rights adjudication this causes are a steep price to pay for the use of a seemingly comforting phrase such as the 'territorial principle'.

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<sup>111</sup> In addition to the examples above see the following cases of the ECtHR: *Issa v. Turkey*, *supra* note 3, at 71; *Hassan v. UK*, *supra* note 3, at 74-80; *Jaloud v. Netherlands*, Judgment of 20 November 2014, [2014] ECHR (Appl. No. 47708/08), at 139-153; *Pisari v. Moldova*, Judgment of 19 October 2015, [2015] ECHR (Appl. No. 42139/12), at 33.

<sup>112</sup> *Lopez Burgos v Uruguay*, *supra* note 12, at 12.2 and 12.3.

<sup>113</sup> Section 1 *supra*.

<sup>114</sup> *Al-Skeini v. UK*, *supra* note 3, at 133-137.

<sup>115</sup> *Ibid.*, at 130.

<sup>116</sup> Raible, *supra* note 1.

<sup>117</sup> L. Raible, 'Human Rights Watch v Secretary of State for the Foreign and Commonwealth Office: Victim Status, Extraterritoriality and the Search for Principled Reasoning' (2017) 80 *Modern Law Review* 510, at 520-524.

Among the authors defending, or at least adopting, what I call the separation model, Besson is the clearest in her reasons for doing so. She notes:

The relational nature of jurisdiction between a subject and the authority needs to be stressed, as it corresponds to the relational nature of human rights between a right-holder and a duty-bearer. Article 1 ECHR situates human rights within a relationship of jurisdiction and makes them dependent on it: jurisdiction both requires the recognition of human rights normatively (jurisdiction as normative trigger of human rights) and provides the conditions for the corresponding duties to be feasible (jurisdiction as practical condition of human rights). Jurisdiction amounts, therefore, at once to a normative threshold and a practical condition for human rights.<sup>118</sup>

I read this passage to mean that jurisdiction as a threshold criterion captures the relational nature of human rights as a particular category of norms.<sup>119</sup> It thus has everything to do with the nature and function of international legal human rights and precisely nothing with whether or not a state has title to territory. Accordingly, she argues next that jurisdiction should be understood as a functional criterion with a territorial dimension.<sup>120</sup> Put differently, the territorial dimension of jurisdiction is a consequence of the function of jurisdiction as described above, not the other way around. Finally, Besson also expressly rejects the differentiation model by saying that ‘... there are no reasons ... why jurisdiction should be conceived differently depending on whether it applies inside or outside the territory of a state party.’<sup>121</sup>

Turning to evaluating the separation model, I argue that it satisfies the success criteria. In its clearest form, the model is premised on the idea that the relational nature of human rights as opposed to other considerations should inform the meaning of jurisdiction. This means that the separation model focuses on the allocation of human rights obligations according to a state’s relationship with the individual in question, not the territory the individual happens to be found on. It follows that the separation model accounts well for the crucial connection of

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<sup>118</sup> Besson, *supra* note 16, at 863.

<sup>119</sup> This interpretation is also faithful, I believe, to her work on the nature of human rights more generally. See, e.g., Besson, *supra* note 66.

<sup>120</sup> Besson, *supra* note 16, at 863.

<sup>121</sup> *Ibid.*, at 866.

the relational nature of human right and the allocation of obligations. It does so precisely by eliminating the confusing link with title to territory. This means that the separation model fits well with the relational nature of human rights postulated above. The result of this evaluation further elucidates the issues with the approximation and the differentiation models: it seems that title to territory, conceptually speaking, has too little in common with jurisdiction in international human rights law to contribute to the latter's interpretation. In fact, after the evaluation of all three models using title in this way appears to be an attempt to square the circle.

## **7. Conclusion**

This article has shown that, despite received wisdom to the contrary, title to territory continues to shape our understanding of jurisdiction in international human rights law. In order to show further that this should be avoided, it analysed the relationship of the two concepts. After considering a few examples pertaining to their potential connection, the article defined each of the concepts in line with their purpose. Jurisdiction was defined as a threshold criterion that triggers human rights obligations of states towards particular individuals and title described as a set of claims to territory that – at their heart – are designed to uphold minimal stability. Next the paper introduced three models of the relationship and evaluated them in light of their fit with the relational nature of human rights. The result of the evaluation was that the approximation and differentiation models – that is, those that maintain title's influence on the interpretation of jurisdiction in various degrees – fail the success criterion, while the separation model satisfies it.

The most important finding is thus that title to territory as understood in public international law cannot and ought not to inform the meaning of jurisdiction in international human rights law. This is significant as the implicit use of territorial conceptions of jurisdiction linger on in the reasoning of authors, and particularly the ECtHR even when the outcomes of their reasoning align with the separation model. In light of this it is safe to say that much of

what plagues the approaches taken by the ECtHR is based on these models lingering on as assumptions. The conflation of the various models introduced here means that the Court keeps falling back on notions such as that jurisdiction is ‘primarily territorial’ and thus has never fully arrived at an interpretation of jurisdiction that pays sufficient attention to the distinction between jurisdiction as right and jurisdiction as duty stressed above.

It has not been the aim of this article to offer a new account of jurisdiction. Instead, the goal was to illuminate the relationship between jurisdiction in international human rights law and title to territory. This means that, in and of itself, the argument presented here does not aim to support or undermine any of the numerous interpretations of jurisdiction that have been proposed so far. However, the argument has implications for the limits of such accounts. In particular, I suggest that looking for guidance on jurisdiction in territorial notions should either be informed by the purpose of the former, or avoided entirely.

Thus, the findings of this paper could be employed to avoid some of the shortcomings of the interpretation of jurisdiction in human rights treaties. This is true for the ECHR, where the debate is advanced and the arguments are sophisticated, but also for other instruments where the concept of jurisdiction has not yet been elaborated on in as much detail. Finally, and pertaining to international human rights law in general, approaches to jurisdiction that rely – even implicitly – on notions related to title to territory should be approached with caution and, where they subvert the purpose of jurisdiction as a justificatory tool for the allocation of human rights obligations, abandoned.